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No. 02-1692

Supreme Court, U.S.
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In The
Supreme Court of the United States

KAREN MOORE, et al.,

Petitioners,

v.

HANNON FOOD SERVICE, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents do not deny that there is a conflict among the circuits regarding the meaning of the window of correction regulation. Respondents contend that certiorari should not be granted to review the Fifth Circuit's interpretation of the regulation because it is "manifestly correct." (Response to Petition, p. 5). Instead, they suggest, certiorari would be appropriate only to review a decision from one of the "clearly erroneou[s]" circuits which have approved the Secretary's interpretation of the Department of Labor regulation. (*Id.*).

Contrary to Respondents' suggestion, when such an inter-circuit conflict exists, the decision to grant a writ of certiorari does not depend upon, or require, a predetermination by this Court of which circuits are "correct" and which are in "erro[r]." The Respondents' contention assumes that the Court, prior to granting certiorari, would decide the merits of the Question Presented. Obviously, the Court's practice is to the contrary.

Respondents assert that the repeated improper deductions in this case did not constitute a "policy or practice," and thus could be corrected even under the Secretary's interpretation of the window of correction regulation. (Response to Petition, pp. 1-3). Both courts below concluded otherwise. The district court opinion held:

> [T]he court concludes that the defendants during the four-month period . . . had an actual *practice* of making improper deductions as well as an employment *policy* that created a substantial likelihood that such deductions would occur. . . . [T] he window of correction . . . cannot be used to remedy a practice or policy of improper deductions.

> The court . . . concludes that the defendants' *admitted policy* . . . constituted a *policy or practice* of improper deductions.

(Petition, App. 29) (Emphasis added).[1]

The court of appeals characterized the events in this case in similar terms.

> Th[e] new *practice* resulted in a total of seventeen deductions. . . . Hannon made its legal counsel aware of the *policy* in February 1998, and counsel prepared a memorandum advising Hannon to discontinue the *practice*.

(Petition, App. 2-3) (Emphasis added). Respondents' contention that its conduct was not a "policy or practice" could not even provide an alternative basis for affirmance, because Respondents did not advance this argument in the court below.

The regulation at issue in this case may be amended in a manner that would resolve the instant litigation. Several months after the decision of the court of appeals, the Labor Department proposed a general revision of the regulations which define and limit the exemptions for executive, administrative and professional employees. (68 Fed. Reg. 15560;

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[1] Similarly, the district court opinion held:

> [T]he defendants had an actual *practice* of making improper deductions. . . . [T]here can be no doubt that the defendants had an actual *practice* of making improper deductions. . . . The defendants themselves admit that KFC management made a *policy* decision to begin deducting the amounts. . . . [T]he *policy* of making deductions for cash shortages from the managers' weekly salaries was clear and particularized.

(Petition, App. 25-26) (Emphasis added).

also available at www.dol.gov/_sec/media/speeches/541 Handout.htm). Proposed section 541.603(a) of the new regulation would effectively codify the Secretary's long-standing interpretation of the window of correction regulation.

> An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer has a *pattern and practice* of not paying employees on a salary basis. A pattern and practice of making improper deductions demonstrates that the employer did not intend to pay employees in the job classification on a salary basis. Improper deductions that are isolated or inadvertent, however, will not result in loss of the exemption.

(68 Fed. Reg. 15594) (Emphasis added). Similarly, section 541.603(b) would provide that "If the facts demonstrate that the employer has a *policy* of not paying on a salary basis, the exemption is lost." (*Id.*).

If the Secretary were to adopt a new regulation with this (or comparable) language, the appropriate disposition of the instant petition would be to grant certiorari, to vacate the decision below, and to remand the case for further consideration in light of that new regulation. *See e.g.*, *Raquel v. Education Management Corp.*, 531 U.S. 952 (2000) (certiorari granted, decision vacated and remanded for reconsideration in light, inter alia, of the Copyright Office's Statement of Policy published in the Federal Register); *INS v. Elramly*, 518 U.S. 1051 (1996) (decision vacated and case remanded for reconsideration in light of intervening enactment of the Antiterrorism and Effective Death Penalty Act of 1996). If, on the other hand, such a

new regulation is not adopted, then certiorari should be granted and the case decided by the Court on its merits.

As the instant brief is being filed in early July, 2003, it is not possible to know what action the Secretary will take on this proposal. The comment period with regard to this general revision of the FLSA regulations closed on June 30, 2003. (68 Fed. Reg. 15560). The revision as a whole has provoked considerable controversy; a number of opponents have objected, asserting that other portions of the proposal would withdraw overtime rights from several million workers protected by the current version of the FLSA regulations.[2] At this time the outcome of the controversy is impossible to predict.

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[2] *See, e.g.*, Statement of the AFL-CIO, June 26, 2003 (available at http://aflcio.org/yourjobeconomy/overtime pay); Statement of the National Organization for Women, June 12, 2003 (available at http://www.now.org/issues/economic/061203.dol.html). *See also New York Times*, July 1, 2003, page A19, col. 3 ("Democrats Protest Changes to Overtime Rules").

Accordingly, Petitioners will, no later than September 15, 2003, file with the Court a supplemental brief setting forth what action (if any) the Secretary of Labor has taken during the two and one half months following the end of the comment period.

Respectfully submitted,

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